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# IN THE SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1960**

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## No. 180

HARRY JOSEPH PAYNE,

*Petitioner,*

*vs.*

PAUL J. MADIGAN,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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## No. 184

THOMAS E. YOUNG,

*Petitioner,*

*vs.*

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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## REPLY BRIEF FOR THE PETITIONERS

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## REPLY BRIEF FOR THE PETITIONERS

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Rather than aiding the resolution of the vital problems of judicial administration acknowledged by this Court's grants of certiorari, the Justice Department's brief deals in legalisms without perceiving the heart of the case.

Fundamentally, petitioners maintain that federal judges must pronounce multiple sentences so as to inform a criminal defendant clearly when *each* sentence begins and ends, and that no clerical form prepared in the defendant's absence after the close of the judicial proceeding can cure ambiguous sentences pronounced by the judge in open court. Such minimal standards of civilized procedure are essential not only to protect the rights of criminal defendants and to preserve the dignity of the judicial sentencing function, but also to stem the flood of prisoners' post-conviction challenges to obscure sentencing pronouncements by federal judges.

The Department's brief, citing Mr. Justice McReynolds' 1926 opinion in the *Daugherty* case to legitimize the vague sentencing pronouncements at bar,[1] basically asserts that (1) criminal sentences may be fathomed from the judge's overall "intent," illuminated by the Judgment and Commitment form, as distinct from his recorded pronouncement in open court; (2) that unlawful imprisonment due to a variance between the judicial pronouncement and the clerical form may not be challenged by habeas corpus; and (3) that any ambiguities in the original sentencing should be redressed by resentencing so as to retrieve the judge's original "intent."

But, as will be shown below, (A) Criminal sentences rest on the judge's recorded pronouncement in open court, not

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[1] Content to endorse the post-*Daugherty* practice of the *lower* courts (Dept. Br. 26-27), the Department ignores whether reassessment of *Daugherty* may now be due in light of the experience of over thirty years. Particularly, the Department's rejection of Mr. Justice Bradley's *Patterson* rule as "arbitrary and unpersuasive" (Dept. Br. 29) overlooks that Form 25 of the Federal Rules of Criminal Procedure adopted in 1946 applies the *Patterson* standards to the Judgment and Commitment forms in *all* criminal proceedings.

on his unspoken "intent" or a clerical form signed after the close of the proceeding in the defendant's absence; (B) Habeas corpus is the historic legal remedy for prisoners incarcerated beyond the term authorized by the judge's sentencing pronouncement; and (C) An ambiguous sentence may not be cured by resentencing years later, but must be carried out as properly construed.

A. Criminal Sentences Rest on the Judge's Recorded Pronouncement in Open Court, Not on His Unspoken "Intent" or a Clerical Form Signed After the Close of the Proceeding in the Defendant's Absence.

Contrary to the Department's pervasive stress on the judge's "intent" (Dept. Br. 14-16-21, 29-30, 32, 34-35), "The only sentence known to the law is the sentence or judgment entered upon the records of the court." *Hill* v. *United States*, 298 U.S. 460, 464 (1936). Thus, "Final judgment in a criminal case means sentence. The sentence is the judgment." *Berman* v. *United States*, 302 U.S. 211, 212 (1937); *Parr* v. *United States*, 351 U.S. 513, 518 (1956). For "The court speaks through its judgment, and not through any other medium." *Hill* v. *United States*, 298 U.S. at 465.

By contrast, Judgment and Commitment forms, which ordinarily are prepared by the clerk and signed by the judge in the defendant's absence, are merely secondary evidence of the sentence or judgment. The clerk's judgment entry has always been "merely the formal evidence" of the judge's pronouncement from the bench, and the commitment is "the final process for carrying the judgment into effect." *Watkins* v. *Merry*, 106 F. 2d 360, 361 (10th Cir. 1939). The *combined* recordation of the judgment and the commitment warrant in a single form under Form 25 of

the Federal Rules of Criminal Procedure has neither revolutionized these functions, nor elevated the *ex parte* clerical entry to superior authority.[2]

Hence such ministerial forms cannot vary criminal sentences imposed in open court, but must reflect the judge's pronouncement "without addition or amendment." *Hill* v. *United States*, 298 U.S. at 466. And when such forms are prepared out of the defendant's presence by a clerk, they cannot rationally or properly "cast light upon, and clarify any ambiguity in, the judges' intention in their oral pronouncements of sentence, much as legislative history is examined to help interpret the language of a statute" (Dept. Br. 16).

Indeed, resort to Judgment and Commitment forms "to help understand the oral sentences" (Dept. Br. 30) degrades the judicial sentencing function, by subordinating the judge's solemn pronouncement in open court to a routine entry prepared in the defendant's absence by a clerk.

### B. Habeas Corpus Is the Historic Legal Remedy for Prisoners Incarcerated Beyond the Term Authorized by the Judge's Sentencing Pronouncement.

Only a fundamental confusion between the clerical form and the actual recorded judgment can account for the Department's belated and unprecedented claim that habeas

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[2] See, *e.g.*, *Gilliam* v. *United States*, 269 F.2d 770, 772 (D.C. Cir. 1959) ("order of judgment and commitment is merely evidence of this sentence"); *Spriggs* v. *United States*, 225 F.2d 865, 868 (9th Cir. 1955) ("The journal entry or signed document is not the order of the court. The order of the court is the pronouncement made by the judge in open court"). In fact, the Department itself agreed that "the oral pronouncement of sentence from the bench is the judgment of the court," so that in case of conflict "the transcript, which is the more reliable evidence, must prevail" (Dept. Opp. (180) 14).

corpus does not lie to challenge imprisonment in excess of the judge's sentencing pronouncement (Dept. Br. 27-29).

As recognized by the judicial consensus, imprisonment under a Judgment and Commitment which varies from the actual sentencing pronouncement may be tested either by a corrective motion under 28 U.S.C. § 2255 *or* by a writ of habeas corpus. On the one hand, a prisoner may move to correct his commitment form so as to square the execution of the sentence with the judicial pronouncement on which it rests.[4] Alternatively, since "A warrant of commitment departing in matter of substance from the judgment back of it is void," the courts for decades have understood that "its nullity may be established upon a writ of habeas corpus." *Hill* v. *United States*, 298 U.S. 460, 465 (1936),[5] and see, *e.g.*, *United States* v. *Patterson*, 29 Fed. 775 (C.C.D. N.J. 1887).[6]

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[3] At no point in the extended prior proceedings before the District Court, the Court of Appeals, or this Court did the Department impugn the jurisdiction of the habeas corpus court to adjudicate the issues raised by petitioner in *Payne*.

[4] Contrary to the Department's understanding (Dept. Br. 29), the Section 2255 procedure was followed in *Young* (R. 31). Accord: *e.g. Gaddis* v. *United States*, 280 F.2d 334 (6th Cir. 1960); *Dailey* v. *United States*, 259 F.2d 433 (7th Cir. 1958); *Ward* v. *United States*, 256 F.2d 179 (10th Cir. 1958).

[5] The Department's brief misunderstands the *Hill* case as involving a "comparison of the warrant of commitment with the judgment, *whereas the issue in the present cases involves comparison of the judgment with the oral pronouncement of sentence*" (Dept. Br. 30 n. 9). But since in *Hill* as well as in the instant cases the judge's recorded sentencing pronouncement was "identical with the sentence orally pronounced" and "the only variance complained of is between sentence and commitment," 298 U.S. at 464, the *Hill* issue precisely corresponds with the instant issue concerning a variance "between sentence and commitment" entered on the Judgment and Commitment form.

[6] See also, *e.g.*, *McIntosh* v. *Looney*, 249 F.2d 62 (10th Cir. 1957), *cert. denied*, 355 U.S. 935 (1958); *Seltenrich* v. *Sigler*, 228

Fundamentally, the Department's tardy and novel jurisdictional challenge to habeas corpus confuses the recorded judgment with the clerical form. For rather than "seeking to impeach the formal records of the sentencing court" (Dept. Br. 28), petitioners here are *relying* on the uncontroverted record of the judicial pronouncement in open court.

The Department's contention that the Judgment and Commitment form may be challenged *only* via the court's powers to correct "clerical mistakes" under Rule 36 of the Federal Rules of Criminal Procedure (Dept. Br. 29) is therefore baseless, and would defeat the historic writ which has been "left sufficiently elastic so that a court may, in the exercise of its proper jurisdiction, deal effectively with any and all forms of illegal restraint." *Price* v. *Johnston*, 334 U.S. 266, 283 (1948).

C. An Ambiguous Sentence May Not Be Cured by Resentencing Years Later, But Must Be Carried Out as Properly Construed.

Resentencing of prisoners held under an originally ambiguous pronouncement could sanction an unlawful increase in their confinement.

In both of these cases, the judge imposed *separate* sentences on diverse criminal indictments and counts. They are governed by the traditional principle that separate criminal sentences run from the time of their imposition—*unless clearly specified otherwise by the judge in his sen-*

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F.2d 615 (5th Cir. 1956), *cert. denied*, 350 U.S. 1001 (1956); *Zahn* v. *Kipp*, 218 F.2d 898 (7th Cir. 1955); *Butterfield* v. *Wilkinson*, 215 F.2d 320 (9th Cir. 1954); *Armstrong* v. *United States*, 210 F.2d 951 (6th Cir. 1954). Actually, no decision has been discovered which rejected habeas corpus to secure such an adjudication.

*tencing pronouncement. E.g., Gaddis* v. *United States*, 280 F. 2d 334 (6th Cir. 1960); *United States* v. *Chiarella*, 214 F. 2d 838 (2d Cir. 1954), *cert. denied*, 348 U.S. 902 (1954); *United States* v. *Patterson*, 29 Fed. 775 (C.C.D. N.J. 1887). By this principle, and as a matter of law, the vague oral pronouncements in these cases can authorize imprisonment only for the longest term of any of the *separate* sentences. There is no "total" or "aggregate" term within which the sequence of the several sentences may be shuffled. (Compare Dept. Br. 19, 37, with *Greene* v. *United States*, 358 U.S. 329 (1959).)

Consequently, any remand for resentencing which directs a longer confinement than authorized by the original and uncontroverted pronouncement by the judge, as *correctly construed*, would illegally expose these petitioners to double jeopardy.[7]

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[7] Petitioners never contended that the "only" inference (Dept. Br. 18) from the words of sentencing pronouncements is imprisonment for a shorter term, but rather that their continued detention was unauthorized by the obscure pronouncements if construed under the *Patterson* principle. Similarly distorted is the Department's statement of petitioners' ostensible position that sentences on multi-count indictments under Rule 8 denote "only" (Dept. Br. 25) facets of a single transaction, so as to justify differing legal treatment between multi-count and multi-indictment sentencing.

Remand of these proceedings is hardly supported by the citation (Dept. Br. 36) of *Downey* v. *United States*, 91 F.2d 223, 235 (D.C. Cir. 1937), directing a hearing where the sentencing judge might be a witness to resolve "a dispute of fact as to what the uttered, as distinguished from the entered, order of a judge was."

## Conclusion

Procedural fairness as well as effective judicial administration require that criminal sentences be imposed with dignity and clarity in open court—without resort to *ex parte* clerical forms "to help understand the oral sentences" (Dept. Br. 30).

Accordingly, and for the reasons outlined in petitioners' main briefs, the decisions below must be reversed.

Respectfully submitted,

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